INSTITUTO BANCARIO SAN PAOLO DI TORINO SPA

v.

COLOUR TOUCH SDN. BHD. & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-1410-92]
5 FEBRUARY 1993

CONTEMPT OF COURT: Failure by defendants' to comply with order of Court - Whether such failure means that defendants cannot be heard to make application to set aside the injunction.

INJUNCTION: Granted exparte - Application by defendants' to set aside - Whether serious questions to be tried - Whether balance of convenience lay in favour of the plaintiffs - Whether there was suppression of material facts at the time of making of the application for the injunction.

The plaintiffs obtained an *ex parte* injunction restraining the defendants from *inter alia* selling, disposing of, parting with possession of or otherwise dealing with certain leather goods which were in their possession. The defendants applied to set aside the injunction on a plethora of grounds.

At the hearing, Counsel for the plaintiff objected to the defendants being heard on the ground that they had failed to comply with prayer 5 of the order of Court, and as such, it was submitted, they were in contempt of Court and should not be heard.

Held:

[1] The origin of the rule that a party in contempt cannot be heard or take proceedings in the same course until he had purged his contempt applied only where a writ of attachment had issued or where an order for committal had been made. The rule could not apply to set aside an injunction granted *ex parte*.

[2] The defendants had not produced any evidence to explain how the goods are in their possession or whether they are the owners thereof. The plaintiff had also shown that the goods in the defendants' possession are identical to those in their documents.

[3] There was a serious question to be tried and the balance of convenience lay in favour of the plaintiff for the *status quo* to remain as from the date of the injunction.

[4] There was no suppression of material facts at the time of the making of the application for the injunction.

[Defendants' applications dismissed with costs].

Cases listed at the end of the judgment as "cases referred to":

Hadkinson v. Hadkinson [1952] CA 285
The Assunzione [1954] 1 AER 278
Cantrans Services [1965] Ltd. v. Clifford [1974] 1 MLJ 141
Lam Kok Trading Co. (Pte.) Ltd. & Anor. v. Yorkshire Switchgear & Engineering Co. Ltd. [1976] 1 MLJ 239
R. v. International Trustee For The Protection of Bondholders AKT [1937] 2 AER 164
Ngui Mui Khin & Anor. v. Gillespie Brothers. & Co. Ltd. [1980] 2 MLJ 9
Re Sebastian, ex p Metroplex Leasing & Credit Corp. Sdn. Bhd [1990] 3 MLJ 248
Snell v. Unity Finance, Ltd. [1963] 3 All ER 50
Batra v. Ebrahim [1982] 2 Lloyd's Report 11
Reg. v. Aik Hoe & Co. Ltd. [1958] 24 MLJ 59
American Express Sdn. Bhd. v. Dato Wong Kee Tat & Ors. [1990] 1 MLJ 91
American Express International Banking Corp. v. Tan Loon Swan [1992] 1 CLJ 9
Malayan Banking Bhd. v. Agencies Service Bureau Sdn. Bhd. & Ors. [1982] 1 MLJ 198
Chiew Vui Kiet & Anor. v. Chong Fook Tien & Ors. [1971] 2 MLJ 158
Chop Tiong Kok Hang v. Hock Cheong & Co. [1934] 3 SSLR 74
North Central Wagon Finance Co., Ltd. v. Brailsford And Another [1962] 1 All ER 502
Fook Lee Tin Mining Kongsi v. Gurdev Singh [1952] 18 MLJ 55
Ponnuthurai v. Nasib Singh [1964] 30 MLJ 425
Barclays Bank, Ltd. v. Commissioners of Customs And Excise [1963] 1 QB 81
Shanti Kant Jhinghan v. Owners or other persons interested in the vessel 'Indera Pertama' of the Port of Kelang & Anor. [1989] 1 CLJ 515
J. Sewell And Nephew v. James Burdick on behalf of himself and Ors., the owners of the Steamship "Zoe" [1884] H.L.(E.) Vol. X 74
Brandt And Another v. Liverpool, Brazil And River Plate Steam Navigation Company, Limited [1923] 1 KB 575
The "Jag Shakti"; Chabbra Corp. Pte. Ltd. v. M.V. "Jag Shakti", Owners & Ors., Interested [1986] 1 MLJ 105
Sprange v. Barnard [1789] 2 Bro. CC 585

Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors. [1983]1 MLJ 407
Sari Artists Film Productions Sdn. Bhd. v. Malaysia Film Industries Sdn. Bhd. [1974] 1 MLJ 123
Charles Rickards Ltd. v. Oppenhaim [1950] 1 KB 616
The Metamorphosis [1953] 1 All ER 723
Government of Malaysia & United Engineers (M) Bhd. v. Lim Kit Siang [1988] 1 CLJ 219/ [1988] 2 MLJ 12
Vethanayagam v. Karuppiah & Ors. [1968] 1 MLJ 283
J.H. Rayner (Mincing Lane) Ltd. & Ors. v. Manilai & Sons (M) Sdn. Bhd. & Anor. [1987] 1 MLJ 312
Alloy Automotive Sdn Bhd. v. Perusahaan Ironfield Sdn. Bhd. [1986] 1 MLJ 382
R.M.N.L. Letchumanan Chettiar v. A.L.V. Alagappa Chettiar Aministrator of the Estate of A.L.V. Kasivisvanathan Chettiar decd. [1934] SSLR 50
Palaniappa Chettiar v. Arunasalam Chettiar [1962] 28 MLJ 143
Elders Keep Ltd. (Formerly known as Keep Brothers Ltd.) v. Luen Mei Plastic Industries Sdn. Bhd. & 5 Ors. [1989] 2 CLJ 1005

Legislation referred to:
Banking Act 1973, s. 3

Other sources referred to:
Borrie & Lowe's Law of Contempt, pp. 460 & 461

For the plaintiff - Teh Yoke Hooi; M/s. Raja, Darryl & Loh
For the defendants - S. Kanawagi (Balwant Singh with him); M/s. Khana & Co.

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:
By separate applications filed on the same date, that is 30 October 1992, both the defendants had applied, upon a certificate of urgency, to set aside the *exparte* injunction granted to the plaintiff on 21 October 1992 and for damages and costs. Basically, both the supporting affidavits state that since the plaintiff are bankers incorporated in Italy and operating a branch in Singapore and since their writ and injunction application are based upon banking business done in Singapore and Malaysia, their activities are illegal here as they had carried on banking acts without a valid banking licence and that since their documents are unstamped, they had also contravened the stamping laws and the laws relating to bills of sale. The defendants had also particularised their allegations of fraud on the part of the plaintiff in their affidavits.

The order on 21 October 1992 had restrained the defendants whether by their directors, servants or agents from transferring, charging, pledging, selling, disposing of, parting with possession of, or otherwise howsoever dealing with, the two sets of Art Megatti (Madras) leather goods at 122,884.75 square feet and 7,334 kilogrammes and at 258,707.50 square feet and 15,644 kilogrammes respectively and one set of Art Ascotti (Calsoft) leather goods at 33,573.72 square feet and 2,225 kilogrammes, the proceeds of sale thereof or any property derived from such proceeds of sale, and had directed the defendants to disclose to the party serving the order the precise location of the said leather goods and in addition to file into Court and serve on the plaintiff's solicitors within three days of service of the order an affidavit stating the present whereabouts of the said leather goods, whether any of the said goods have been sold and what had happened to the proceeds of sale.

At the outset, learned Counsel for the plaintiff had preliminarily objected to the fact, which I might add surprised learned Counsel for the defendants somewhat, that the defendants had failed to comply with prayer 5 of the said order and that since they were in contempt of Court, they should not be heard. She had referred me to pp. 460 and 461 of **Borrie and Lowe's Law of Contempt** but on a cursory reading of the referred pages during the brief recess following the objection, I had discovered that the origin of the rule that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt applied only where a writ of attachment had issued or where an order for committal had been made. At p. 461 it is further stated:

> It is also established that the rule is in applicable to an application to purge the contempt, or to the bringing of an appeal with a view to setting aside the order upon which the alleged contempt is founded. A party will also be heard to support a submission that upon the true construction of the order alleged to be disobeyed, his actions did not constitute a contempt, or that having regard to all the circumstances, he ought not to be treated as being in contempt. The reason that a party is allowed to be heard in

these latter cases is that the object of the further application is to clear the very contempt complained of; on the other hand the rule does *prima facie* operate where the party in contempt seeks to invoke the aid of the Court in the same cause upon some other issue than the issue of contempt itself.

In the event, I was more inclined to hold the view that the rule could not apply to set aside an injunction granted *exparte* and accordingly overruled the preliminary objection. Further, as the plaintiff had already discovered the whereabouts of the leather goods, to my mind, prayer 5 was of no consequence.

On the applications proper, learned Counsel for the defendants did not submit orally and chose to rely on his prepared written submissions. He had submitted that the plaintiff's activities in this country were illegal as they did not posses a valid banking licence as required by s. 3 of the Banking Act 1973 the plaintiff having pleaded that they were a bank incorporated in Italy and having a branch in Singapore. Since their agreement was with Colour Touch (S) Pte. Ltd. (hereinafter ("CTS"), he was of the view that the proper forum for the dispute should be the Singapore Courts if the claim was based on breach of the said agreement.

By that agreement, the plaintiff had granted letters of credit and trust receipt facilities to CTS. Two of the letters of credit were for valuable leather and CTS had converted the relevant three bills of lading into three trust receipts. They had taken delivery of the goods but had failed to pay the plaintiff. The goods in the three trust receipts had since been shipped to Kuala Lumpur and were now in the possession of the two defendants.

I was in full agreement with learned Counsel for the defendants that if there was a breach of the agreement, the forum would be the Singapore Courts but if it was based on a claim for goods currently in Malaysia then the proper forum was the High Court here. It may be true that CTS may have committed some breach of the agreement but we are more concerned with the fact that the goods are now here and the plaintiff, who are owners of the goods are worried that the said goods might be dissipated rendering it impossible to trace them as they may be mixed with other goods. Moreover, it would be equally impossible to trace the proceeds of sale and damages in the circumstances would therefore be rendered inadequate.

It follows, therefore, that we are not concerned so much with the breach of agreement by CTS and so it does not matter whether the plaintiff had a banking licence in Malaysia, and whether the relevant documents were stamped here or that they offended the local legislation pertaining to banking business, securities, bills of sale, bills of lading, carriage of goods by sea, sale of goods, trusts or exchange control, as pointed out by learned Counsel for the defendants.

Learned Counsel for the plaintiff had argued that they are not carrying on a banking business in Malaysia and that their case was based on conversion and criminal breach of trust and that apart from the documents relating to the agreement with CTS showing that the plaintiff is entitled to the goods, the defendants had not produced any evidence to explain how the goods are in their possession or whether they are the owner's thereof. The plaintiff had also shown that the goods in the defendants' possession are identical to those in their documents. We also have evidence that the first defendant is in the process of being dissolved and the second defendant is a mere RM2 company.

In these circumstances, my view was that there was indeed a serious question to be tried and the balance of convenience lay in favour of the plaintiff for the *status quo* to remain as from the date of the injunction. I had also found no suppression of material facts at the time of the making of the application for the injunction, as contended by learned Counsel for the defendants. Accordingly, I had dismissed both the applications with costs but in view of the plaintiff being out of the jurisdiction, I had directed that they deposit RM20,000 as security for costs to fortify their undertaking for damages within two weeks of my decision.